

SF 278 AND RELATED RECORDS PUBLIC ACCESS ISSUES
Application of the Ethics in Government Act, Freedom of Information
Act (FOIA), and Privacy Act to SF 278 File Documents

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PUBLIC FINANCIAL DISCLOSURE REPORTS (SF 278s)

- **The SF 278s are not available under FOIA.** FOIA exemption 3, § 552(b)(3), states that the FOIA does not apply to matters that are exempt from disclosure by another statute.
- Compliance with the special access provisions of the Ethics in Government Act is the only means of public access to the SF 278s. See Church of Scientology v. IRS, 816 F. Supp. 1138, 1152 (W.D. Tex. 1993), appeal dismissed per stipulation, No. 93-8431 (5th Cir. 1993).
- Likewise, the Ethics Act access procedures apply to the disclosure of certificates of divestiture, 18 U.S.C. § 208(b)(1) & (3) waivers, publicly available qualified trust materials and OGE Form 201 (Request to Inspect or Receive Copies of SF 278s or Other Covered Record).

ETHICS AGREEMENTS, REVIEWER'S NOTES AND OTHER MATERIAL (SUCH AS TRANSMITTAL LETTERS, RESIGNATION LETTERS AND ETHICS COMPLIANCE DOCUMENTS)

- The FOIA applies to all other ethics records. These records **may be** released under the FOIA **unless** an exemption or exclusion applies. For example,
 - S FOIA exemption (b)(4) covers sensitive commercial/financial information (including personal financial information).
 - S Draft documents and staff notes shared between the agency and the filer or OGE may be exempt under FOIA (b)(5) as predecisional staff deliberative process, attorney work product & attorney-client privileged materials. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 10-14 (D.D.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996).
 - S FOIA exemption (b)(6) covers the disclosure of records which would be a clearly unwarranted invasion of personal privacy, such as personnel and medical records and similar files.

- S FOIA exemption (b)(7) covers records compiled for law enforcement purposes under certain circumstances.

WHAT PART OF AN ETHICS RECORD IS RELEASABLE

- FOIA exemptions may apply to an entire record or a portion of the record. Under FOIA § 552(b), if a portion of a record can be reasonably separated then the portion that does not fall under one of the exemptions must be released.
- Any material submitted with an SF 278 that is physically attached to, or referenced within, the report (such as an ethics agreement) becomes part of the SF 278 and is released under the special access provisions of the Ethics Act. All other material that does not fall under the special access provision of the Ethics Act, may be released under FOIA unless an exemption applies.

PRIVACY ACT

In General

- OGE's SF 278 file folders are arranged in alphabetical order by the last name of the filer so they fall under the provisions of the Privacy Act, 5 U.S.C. § 552a, as a system of records containing personal information retrievable by name or some other personal identifier (i.e., social security number or certificate of divestiture number). It would not include a file labeled "Ethics." (See Gowan v. Department of the Air Force, 148 F.3d 1182, 1191 (10th Cir. 1998)), and cert. denied, 525 U.S. 1042 (1998).
- If information is contained in a Privacy Act system of records, then the agency cannot disclose that information without advance written consent by, or at the request of, the individual concerned, unless one of the Privacy Act exceptions applies.
- There are 12 exceptions which permit the release of information, including:
 - S § 552a(b)(1) for disclosure to employees of the agency that maintains the records who have an official need to know, for example –
 - disclosure to a superior or a personnel officer to prepare a response to a discrimination complaint (Bigelow v. DOD, 217 F.3d 875 (D.C. Cir. 2000), and cert. denied, 532 U.S. 971 (2001)).
 - disclosure to an Inspector General to detect fraud (Covert v. Harrington, 876 F. 2d 751, 753-54 (9th Cir. 1989))

- disclosure to OGE (disclosure is considered as made to an agency that co-maintains the records with a need for the records in performance of official duties in accordance with the Ethics in Government Act of 1978, 5 U.S.C. app. and other ethics-related laws);
- S § 552a(b)(2) for the disclosure of records required under 5 U.S.C. § 552 (FOIA); and
- S § 552a(b)(3) that permits release of information for Federal Register published routine uses.

Federal Register published routine uses

- On January 22, 2003, OGE published a proposed Privacy Act rule, 68 FR 2923-2929, and a notice of proposed new and revised Privacy Act systems of records, 68 FR 3097-3109 (part II). The proposed rule and notice would establish revised, detailed regulatory procedures relating to the access, maintenance, disclosure, and amendment of records in the two Governmentwide systems of ethics records (OGE/GOVT-1, Executive Branch Personnel Public Financial Disclosure Reports and Other Name-Retrieved Ethics Records (comprised of SF 278 reports and other name-retrieved ethics program records) and OGE/GOVT-2, Executive Branch Confidential Financial Disclosure Reports (comprised of OGE Form 450 confidential reports and certifications of no new interests).
- The proposed rule sets forth the access, appeal and amendment procedures and discusses the OGE and agency responsibilities under the Privacy Act with regard to records contained in the OGE Governmentwide systems of records. A request for access to a record, the appeal of a denial of access, and an amendment request will continue to be directed to the agency, which maintains the record for a response.
- The notice of proposed new and revised systems of records includes a list of routine uses for each system that allows disclosure without receiving consent. For example, there is a routine use in OGE/GOVT-1 that permits disclosure of SF-278s in accordance with provisions of section 105 of the Ethics in Government Act of 1978, as amended).
- Other routine uses which are in both OGE/GOVT-1 and OGE/GOVT-2 include –
 - to disclose information to another Federal agency, to a court, or a party in litigation before a court or an administrative proceeding when the Government is a party or to comply with a subpoena;
 - to disclose information to any source when necessary to obtain information relevant to a conflict of interest investigation or determination; and

- to disclose, in response to a discovery request or for the appearance of a witness, information relevant to the subject matter involved in a pending judicial or administrative proceeding.
- In addition, there are several proposed new routine uses in the systems notice that would permit disclosure of records, including:
 - S the disclosure of financial disclosure reports and accompanying documents to reviewing officials in a new office, department or agency when an employee transfers or is detailed from one covered position to a covered position in another office, department or agency;
 - S the disclosure of information to a Member of Congress or a congressional office in response to an inquiry made on behalf of an individual who is the subject of the record; and
 - S the disclosure of information to contractors, experts, consultants, detailees and other non-Government employees performing or working on a contract or other assignment for the Federal Government when necessary to accomplish an agency function related to a system of records.